

**MEMORANDUM OF UNDERSTANDING BETWEEN  
THE FEDERAL HIGHWAY ADMINISTRATION AND THE  
FLORIDA DEPARTMENT OF TRANSPORTATION CONCERNING THE  
STATE OF FLORIDA'S PARTICIPATION IN THE SURFACE TRANSPORTATION PROJECT DELIVERY  
PROGRAM PURSUANT TO 23 U.S.C. 327**

THIS MEMORANDUM OF UNDERSTANDING (hereinafter "MOU") is entered into by and between the FEDERAL HIGHWAY ADMINISTRATION (hereinafter "FHWA"), an administration in the UNITED STATES DEPARTMENT OF TRANSPORTATION (hereinafter "USDOT"), and the STATE OF FLORIDA, acting by and through its FLORIDA DEPARTMENT OF TRANSPORTATION (hereinafter "FDOT"), hereby provides as follows:

WITNESSETH

**Whereas**, Section 327 of Title 23 of the United States Code (U.S.C.) establishes the Surface Transportation Project Delivery Program (hereinafter "Program") that allows the Secretary of the United States Department of Transportation (hereinafter "USDOT Secretary") to assign and states to assume the USDOT Secretary's responsibilities under the National Environmental Policy Act of 1969, 42 U.S.C. §4321, et seq. hereinafter "NEPA", and all or part of the USDOT Secretary's responsibilities for environmental review, consultation, or other actions required by federal environmental law with respect to highway, public transportation, railroad, and multimodal projects within the state; and

**Whereas**, 23 U.S.C. §327(b)(2) requires a state to submit an application in order to participate in the Program; and

**Whereas**, on April 15, 2016, prior to submittal of its application to FHWA, FDOT published notice of and solicited public comment on its draft application to participate in the Program as required by 23 U.S.C. §327(b)(3), and addressed the comments received as appropriate; and

**Whereas**, the Florida Legislature passed House Bill 7027 and the Governor signed it into law on April 4, 2016 as Chapter 2016-181, Laws of Florida, allowing the State to participate in the Program; and

**Whereas**, on May 31, 2016, the State of Florida acting by and through FDOT, submitted an application to FHWA with respect to highway projects in the State of Florida; and

**Whereas**, on **DATE TBD**, FHWA published a notice in the *Federal Register* and provided an opportunity for comment on its preliminary decision to approve FDOT's application and solicited the views of other appropriate federal agencies concerning FDOT's application as required by 23 U.S.C. §327(b)(5); and

**Whereas**, the USDOT Secretary, acting by and through FHWA, has determined that FDOT's application meets the requirements of 23 U.S.C. §327 with respect to the Federal environmental laws and highway projects identified in this MOU.

**Now, therefore**, FHWA and FDOT agree as follows:

**PART 1. PURPOSE OF MEMORANDUM OF UNDERSTANDING**

**1.1 Purpose**

- 1.1.1 This MOU officially approves FDOT's application to participate in the Program and is the written agreement required by 23 U.S.C. §327(a)(2)(A) and (c) under which the USDOT Secretary may assign, and FDOT may assume, the responsibilities of the USDOT Secretary for federal environmental laws with respect to one or more highway projects within the State of Florida.
- 1.1.2 FHWA's decision to execute this MOU is based upon the information, representations, and commitments contained in FDOT's May 31, 2016, application. As such, this MOU incorporates the application. To the extent there is any conflict between this MOU and the application, this MOU shall control.
- 1.1.3 This MOU shall be effective upon final execution by both parties (hereinafter the "Effective Date").
- 1.1.4 On October 30, 2015, FDOT and FHWA entered into a *Programmatic Agreement for Categorical Exclusions (hereinafter the "CE Programmatic Agreement")* under 23 C.F.R. §771.117 regarding the Processing of Actions Classified as Categorical Exclusions for Federal-Aid Highway Projects. On the Effective Date of this MOU, the CE Programmatic Agreement will be suspended and supplanted by this MOU for the duration of FDOT's participation in the Program. The CE Programmatic Agreement may be reinstated upon termination of FDOT's participation in the Program if FHWA and FDOT determine that the CE Programmatic Agreement continues to be valid pursuant to applicable statutory and regulatory authorities in effect at the time of the MOU termination.
- 1.1.5 Pursuant to 23 U.S.C. §327(c)(3)(B) and §327(c)(3)(C), and subpart 4.3 of this MOU, FDOT consents to federal court jurisdiction for the limited purpose of a challenge to its exercise of final decision making authority as assigned under this MOU. Third parties may challenge FDOT's action in carrying out environmental review responsibilities assigned under this MOU. Otherwise, this MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any party against the State of Florida, its departments, agencies, or entities, its officers, employees, or agents. This MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents.

**PART 2. [RESERVED]**

**PART 3. ASSIGNMENTS AND ASSUMPTIONS OF RESPONSIBILITY**

**3.1 Assignments and Assumptions of NEPA Responsibilities**

- 3.1.1 Pursuant to 23 U.S.C. §327(a)(2)(A), on the Effective Date of this MOU, FHWA assigns, and FDOT assumes, subject to the terms and conditions set forth in 23 U.S.C. §327 and this MOU, all of the USDOT Secretary's responsibilities for compliance with the National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. 4321 et seq. with respect to the highway projects specified under subpart 3.3. This includes statutory provisions, regulations, and policies and guidance related to the implementation of NEPA for federal highway projects, 23 U.S.C. §139, 40 C.F.R. parts 1500-1508, USDOT Order 5610.1C, and 23 C.F.R. part 771 as applicable.
- 3.1.2 On the cover page of each Environmental Assessment (EA), Finding of No Significant Impact (FONSI), Environmental Impact Statement (EIS), Record of Decision (ROD), and Final EIS (FEIS)/ROD prepared under the authority granted by this MOU, and for memoranda corresponding to any Categorical Exclusion (CE) determination it makes, FDOT shall insert the following language in a way that is conspicuous to the reader or include it in a CE project record:

The environmental review, consultation, and other actions required by applicable federal environmental laws for this project are being, or have been, carried out by

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FDOT pursuant to 23 U.S.C. §327 and a Memorandum of Understanding dated [INSERT DATE], and executed by FHWA and FDOT.

- 3.1.3 FDOT shall disclose to the public and agencies, as part of agency outreach and public involvement procedures, including any Notice of Intent or scoping meeting notice, the disclosure in subpart 3.1.2 above.

### **3.2 Assignments and Assumptions of Responsibilities to Comply with Federal Laws Other Than NEPA**

- 3.2.1 Pursuant to 23 U.S.C. §327(a)(2)(B), on the Effective Date of this MOU, FHWA assigns and FDOT assumes, subject to the terms and conditions set forth in this MOU, all of the USDOT Secretary's responsibilities under NEPA for environmental review, reevaluation, consultation, or other action pertaining to the review or approval of highway projects specified under subpart 3.3 of this MOU, required under the following federal environmental laws:

#### Air Quality

- Clean Air Act, 42 U.S.C. §§7401-7671q, with the exception of project level conformity determinations (42 U.S.C. 7506)

#### Noise

- Noise Control Act of 1972, 42 U.S.C. §§4901-4918
- FHWA noise regulations at 23 C.F.R. part 772
- Airport Noise and Capacity Act of 1990, 49 U.S.C. §§47521-47534

#### Wildlife

- Endangered Species Act of 1973, 16 U.S.C. §§1531-1544
- Marine Mammal Protection Act, 16 U.S.C. §§1361-1423h
- Anadromous Fish Conservation Act, 16 U.S.C. §§757a-757f
- Fish and Wildlife Coordination Act, 16 U.S.C. §§661-667d
- Migratory Bird Treaty Act, 16 U.S.C. §§703-712
- Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. §§1801-1891d, with Essential Fish Habitat requirements at 16 U.S.C. §1855(b)(2)

#### Hazardous Materials Management

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601-9675
- Superfund Amendments and Reauthorization Act (SARA), 42 U.S.C. §§9671-9675
- Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901-6992k

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### Historic and Cultural Resources

- National Historic Preservation Act of 1966, as amended, 54 U.S.C. §306101 et seq.
- 23 U.S.C. §138 and Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. §303 and implementing regulations at 23 C.F.R. part 774
- Preservation of Historical and Archaeological Data, 54 U.S.C. §§312501-312508
- Archeological Resources Protection Act of 1979, 16 U.S.C. §§470(aa)-(mm)
- Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§3001-3013; 18 U.S.C. §1170

### Social and Economic Impacts

- American Indian Religious Freedom Act, 42 U.S.C. §1996
- Farmland Protection Policy Act (FPPA), 7 U.S.C. §§4201-4209

### Water Resources and Wetlands

- Clean Water Act, 33 U.S.C. §§1251-1387 (Sections 319, 401, and 404)
- Coastal Barrier Resources Act, 16 U.S.C. §§3501-3510
- Coastal Zone Management Act, 16 U.S.C. §§1451-1466
- Safe Drinking Water Act (SDWA), 42 U.S.C. §§300f-300j-26
- Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-406
- Wild and Scenic Rivers Act, 16 U.S.C. §§1271-1287
- Emergency Wetlands Resources Act, 16 U.S.C. §3901 and §3921
- Wetlands Mitigation, 23 U.S.C. §§119(g) and §133(b)(14)
- Flood Disaster Protection Act, 42 U.S.C. §§4001-4130
- FHWA wetland and natural habitat mitigation regulations, 23 C.F.R. part 777

### Parklands and Other Special Land Uses

- Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. §138, 49 U.S.C. §303 and implementing regulations at 23 C.F.R. part 774
- Land and Water Conservation Fund (LWCF) Act, 54 U.S.C. §§200302-200310

### FHWA-Specific

- Environmental Impact and Related Procedures, 23 C.F.R. §771
- Planning and Environmental Linkages, 23 U.S.C. §168, with the exception of those FHWA responsibilities associated with 23 U.S.C. §§134 and 135

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- Efficient Project Reviews for Environmental Decision Making 23 U.S.C. §139
- Programmatic Mitigation Plans, 23 U.S.C. §169 with the exception of those FHWA responsibilities associated with 23 U.S.C. §§134 and 135

### Executive Orders (E.O.) Relating to Highway Projects

- E.O. 11988, Floodplain Management, *(except design matters and determinations that significant encroachment is the only practicable alternative under 23 CFR parts 625 and 650)*
- E.O. 11990, Protection of Wetlands
- E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- E.O. 13112, Invasive Species

3.2.2 Any FHWA environmental review responsibility not explicitly listed above and assumed by FDOT shall remain the responsibility of FHWA unless the responsibility is added by written agreement of the parties through the amendment process established in Part 14 of this MOU and pursuant to 23 C.F.R. §773.113(b). This provision shall not be interpreted to abrogate FDOT's responsibilities to comply with the requirements of any federal environmental laws that apply directly to FDOT independent of FHWA's involvement (through federal assistance or approval).

3.2.3 The USDOT Secretary's responsibilities for government-to-government consultation with Indian tribes as defined in 36 C.F.R. §800.16(m) are not assigned to or assumed by FDOT under this MOU per 23 U.S.C. §327(a)(2)(B). The FHWA remains responsible for government-to-government consultation, including initiation of government to government consultation, unless otherwise agreed as described below. A notice from FDOT to an Indian tribe advising the tribe of a proposed activity is not considered "government-to-government consultation" within the meaning of this MOU. If a project-related concern or issue is raised in a government-to-government consultation process with an Indian tribe, as defined in 36 C.F.R. §800.16(m), and is related to NEPA or another federal law for which FDOT has assumed responsibilities under this MOU, and either the Indian tribe or FHWA determines that the issue or concern will not be satisfactorily resolved by FDOT, then FHWA may withdraw the assignment of all or that part of the responsibilities for processing the project. In this case, the provisions of subpart 9.1 of this MOU concerning FHWA initiated withdrawal of an assigned project or part of an assigned project will apply.

This MOU is not intended to abrogate, or prevent future entry into an agreement among FDOT, FHWA, and a tribe under which the tribe agrees to allow FDOT to administer government-to-government consultation activities for FHWA. However, such agreements are administrative in nature and do not relieve the FHWA of its legal responsibility for government-to-government consultation.

3.2.4 Nothing in this MOU shall be construed to allow FDOT's assumption of the USDOT Secretary's responsibilities for conformity determinations required by Section 176 of the Clean Air Act (42 U.S.C. §7506) or any responsibility under 23 U.S.C. §134 or §135, or under 49 U.S.C. §5303 or §5304.

3.2.5 On the cover page of each biological evaluation or assessment, historic properties or cultural resources report, Section 4(f) evaluation, or other analyses prepared under the authority granted by this MOU, FDOT shall insert the following language in a way that is conspicuous to the reader or include in a CE project record:

The environmental review, consultation, and other actions required by applicable federal environmental laws for this project are being, or have been, carried out by FDOT pursuant to 23 U.S.C. §327 and a Memorandum of Understanding dated [INSERT DATE] and executed by FHWA and FDOT.

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- 3.2.6 FDOT shall disclose to the public and agencies, as part of agency outreach and public involvement procedures, the disclosure in subpart 3.2.5 of this MOU.
- 3.2.7 FDOT will continue to adhere to the original terms of Biological Opinions (BOs) issued by the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Services (NMFS) or both prior to the Effective Date of this MOU, so long as the original BO terms are not amended or revised. Any revisions or amendments to a BO made after the effective date of this MOU would be FDOT's responsibility. FDOT agrees to assume FHWA's environmental review role and responsibilities as identified in existing interagency agreements among FDOT, USFWS, NMFS and FHWA, and/or negotiate new agreements with USFWS and NMFS, if needed. FDOT agrees to assume FHWA's Endangered Species Act Section 7 responsibilities of consultations (formal and informal) ongoing as of the Effective Date of this MOU and will be responsible for future consultations after the Effective Date of this MOU.
- 3.2.8 FDOT will not make any determination that an action constitutes a constructive use of a publicly owned park, public recreation area, wildlife refuge, waterfowl refuge, or historic site under 49 U.S.C. §303 / 23 U.S.C. §138 [Section 4(f)] without first consulting with FHWA and obtaining FHWA's approval of such determination.

### **3.3 Highway Projects**

- 3.3.1 Except as provided in subpart 3.3.2 of this MOU or otherwise specified in this subpart, the assignments and assumptions of the USDOT Secretary's responsibilities under subparts 3.1 and 3.2 of this MOU shall apply to the environmental review, consultation, or any other action pertaining to the environmental review or approval of the following classes of highway projects located within the State of Florida. The definition of "highway project" is found at 23 C.F.R. §773.103, and for purposes of this MOU, "highway project" includes eligible preventative maintenance activities. FDOT shall conduct reevaluations required by 23 C.F.R. §771.129 for projects for which construction is not completed prior to the date of this MOU, in accordance with the provisions of this MOU. Prior to approving any CE determination, FONSI, final EIS, or final EIS/ROD, the State shall ensure and document that for any proposed project the design concept, scope, and funding are consistent with the current Transportation Improvement Plan (TIP), Regional Transportation Plan (RTP), or Metropolitan Transportation Plan (MTP) as applicable.

FDOT will be responsible for decisions for all classes of action for highway projects upon the Effective Date as described below:

- A. All Class I, or EIS projects, both on the State Highway System (SHS), which includes the National Highway System, and Local Agency Program (LAP) projects off the SHS that are funded by FHWA or require FHWA approvals. This assignment does not include the environmental review associated with the development and approval of the Draft EIS, FEIS, and ROD for the following projects.
- a. I-4 Beyond the Ultimate (BTU) which consists of the three following project segments: Segment 2 FM # 242484-7 SR 400 (I-4) west of SR 528 (Beachline) to west of SR 435 Kirkman Rd; Segment 3 FM # 242592-4 SR 400 (I-4) 1 mile east of SR 434 to east of SR 15/600/US 17/92 Seminole/Volusia C/L; Segment 4 FM # 408464-2 SR 400 (I-4) east of SR 15/600/US 17/92 to ½ mile east of SR 472; and I-4 Ultimate Segment FM # 242703-1 SR 400 (I-4) west of SR 435 (Kirkman Rd) to east of SR 434.
  - b. Tampa Interstate Study (TIS) which consists of the three following project sections: Section 4 FM # 412531-1 (Note Sections 4 and 5 have same Design FM #) I-275/SR 60 and Northwest/Veterans; Section 5 FM # 412531-1 (Note Sections 4 and 5 have same Design FM #) I-275 Lois to Hillsborough River; and Section 6 FM # 433821-1 I-275/I-4 Downtown Interchange.

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- B. All Class II, or CE projects, both on the SHS and LAP projects off the SHS that are funded by FHWA or require FHWA approvals.
  - C. All Class III, or EA projects, both on the SHS and LAP projects off the SHS that are funded by FHWA or require FHWA approvals.
  - D. FDOT will not assume the NEPA responsibilities of other federal agencies. However, FDOT may use or adopt other federal agencies' NEPA analyses or documents consistent with 40 C.F.R. parts 1500-1508, current law, and USDOT and FHWA regulations, policies, and guidance.
  - E. For projects where FDOT is assuming responsibility, FHWA shall allow FDOT access to its project files and arrange for copies as requested.
- 3.3.2 The following are specifically excluded from the list in subpart 3.3.1 of highway projects and classes of highway projects:
- A. Any Federal Lands Highway projects authorized under 23 U.S.C. §202 and §203
  - B. Any highway projects authorized under 23 U.S.C. §204, unless such projects will be designed and/or constructed by FDOT.
  - C. Any project that crosses state boundaries and any project that crosses or is adjacent to international boundaries. For purposes of this MOU, a project is considered "adjacent to international boundaries" if it requires the issuance of a new, or the modification of an existing, Presidential Permit by the U.S. Department of State.

### **3.4 Limitations**

- 3.4.1 As provided at 23 U.S.C. §327(e), FDOT shall be solely responsible and solely liable for carrying out in lieu of and without further approval of FHWA, all of the responsibilities it has assumed under this MOU.
- 3.4.2 As provided at 23 U.S.C. §327(a)(2)(D), any highway project or responsibility of the USDOT Secretary that is not explicitly assumed by FDOT under subpart 3.3.1 of this MOU remains the responsibility of the USDOT Secretary.

## **PART 4. CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION**

### **4.1 Certifications**

- 4.1.1 FDOT makes the following certifications:
  - A. FDOT has the legal authority to accept all the assumptions of responsibility identified in this MOU;
  - B. FDOT has the legal authority to take all actions necessary to carry out all of the responsibilities it has assumed under this MOU;
  - C. FDOT has the legal authority to execute this MOU;
  - D. The State of Florida currently has laws in effect that are comparable to 5 U.S.C. §552 [Freedom of Information Act (FOIA)] and those laws are found in Chapter 119, Florida Statutes (F.S.) (Public Records); and
  - E. Section 119.11, F.S., provides that any decision regarding the public availability of a document under the Public Records law is reviewable by a Florida court of competent jurisdiction.

#### **4.2 State Commitment of Resources**

4.2.1 As required by 23 U.S.C. §327(c)(3)(D), FDOT will maintain the financial resources necessary to carry out the responsibilities it is assuming. FDOT asserts, and FHWA agrees, that the summary of financial resources contained in FDOT's application, dated May 31, 2016 appears to be adequate for this purpose. Should FHWA determine, after consultation with FDOT, that FDOT's financial resources are inadequate to carry out the USDOT Secretary's responsibilities, FDOT will take appropriate action to obtain the additional financial resources needed to carry out these responsibilities. If FDOT is unable to obtain the necessary additional financial resources, FDOT shall inform FHWA, and this MOU will be amended to assign only the responsibilities that are commensurate with FDOT's financial resources.

4.2.2 Similarly, FDOT currently has and will maintain adequate organizational and staff capability, including competent and qualified consultants where necessary or desirable, to effectively carry out the responsibilities it has assumed under this MOU. This includes, without limitation:

- A. Using appropriate environmental, technical, legal, and managerial expertise;
- B. Devoting adequate staff resources; and
- C. Demonstrating, in a consistent manner, the capacity to perform FDOT's assumed responsibilities under this MOU and applicable federal laws.

Should FHWA determine, after consultation with FDOT, that FDOT organizational and staff capability is inadequate to carry out the USDOT Secretary's responsibilities, FDOT will take appropriate action to obtain adequate organizational and staff capability to carry out these responsibilities. If FDOT is unable to obtain adequate organizational and staff capability, FDOT shall inform FHWA and the MOU will be amended to assign only the responsibilities that are commensurate with FDOT's available organizational and staff capability. Should FDOT choose to meet these requirements, in whole or in part, with consultant services, including outside counsel, FDOT shall maintain on its staff an adequate number of trained and qualified personnel, including counsel, to oversee the consulting work.

4.2.3 When carrying out the requirements of Section 106 of the National Historic Preservation Act, as amended, FDOT staff (including consultants) shall comply with 36 CFR §800.2(a)(1). All actions that involve identification, evaluation, analysis, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation (including 36 CFR §800.11) of such actions in the form of reports, forms, or other records, shall be carried out by or under the review or direct supervision of a person or persons who meet the Secretary of Interior's Professional Qualifications Standards (36 C.F.R. part 61, Appendix A).

4.2.4 As part of its commitment of resources, FDOT will continue to develop, implement and update its Efficient Transportation Decision Making (ETDM) and Project Development and Environment (PD&E) Manuals and procedures which are not subject to FHWA review or approval, to support appropriate environmental analysis and decision-making under NEPA and associated laws and regulations. FDOT recognizes it is solely responsible for the ETDM and the PD&E Manuals and procedures for compliance with responsibilities assigned in this MOU and for establishing policy and guidance to implement its program. Within 6 months of the Effective Date of this MOU, FDOT will update the ETDM and PD&E manuals for the responsibilities assigned to FDOT in this MOU. FDOT will provide notification to FHWA when the ETDM and the PD&E Manuals are revised.

#### **4.3 Federal Court Jurisdiction**

4.3.1 As provided under 23 U.S.C. §327(c)(3)(B), and authorized by Chapter 2016-181, Laws of Florida, FDOT hereby expressly consents, on behalf of the State of Florida, to accept the jurisdiction of the federal courts for the compliance, discharge, and enforcement of any responsibility of the USDOT Secretary assumed by FDOT under this MOU. This consent to federal court jurisdiction shall remain valid after termination of this MOU, or FHWA's withdrawal of assignment of the USDOT Secretary's



responsibilities for any decision or approval made by FDOT pursuant to an assumption of responsibility under this MOU. FDOT understands and agrees that, in accordance with 23 U.S.C. §327, this acceptance constitutes a waiver of the State of Florida's immunity under the Eleventh Amendment to the U.S. Constitution for the limited purposes of carrying out the USDOT Secretary's and FHWA's responsibilities that have been assumed under this MOU.

## **PART 5. APPLICABILITY OF FEDERAL LAW**

### **5.1 Procedural and Substantive Requirements**

- 5.1.1 As provided at 23 U.S.C. §327(a)(2)(C) in assuming the USDOT Secretary's responsibilities under this MOU, FDOT shall be subject to the same procedural and substantive requirements that apply to the USDOT Secretary in carrying out these responsibilities. Such procedural and substantive requirements include federal statutes and regulations, Executive Orders issued by the President of the United States, USDOT Orders, Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 C.F.R. parts 1500-1508), FHWA Orders, formal guidance and policy issued by the CEQ, USDOT, or FHWA, and any applicable federal court decisions, and, subject to subpart 5.1.4 of this MOU, interagency agreements, and other similar documents that relate to the environmental review process, e.g., 2015 Red Book - Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects. Official USDOT and FHWA guidance and policies relating to environmental review are posted on the FHWA's website, contained in the FHWA Environmental Guidebook or published in the *Federal Register*, or sent to FDOT electronically or hard copy.
- 5.1.2 By accepting the USDOT Secretary's and FHWA's NEPA responsibilities, FDOT agrees to perform FHWA's obligations set forth in the 2014 MOU between the USDOT and the USCG and in the 2014 MOA between USCG and FHWA.
- 5.1.3 Upon the Effective Date of this MOU, FHWA will use its best efforts to ensure that any new or revised federal policies and guidance that are final and applicable to FHWA's responsibilities under NEPA and other laws that are assumed by FDOT under this MOU, are communicated to FDOT within 10 business days of issuance. Delivery may be accomplished by e-mail, web posting (with e-mail or mail to FDOT notifying of web posting), mail, or publication in the *Federal Register* (with e-mail or mail to FDOT notifying of publication). If communicated to FDOT by e-mail or mail, such material will be sent to FDOT's Director of the Office of Environmental Management and the following address: [OEM@dot.state.fl.us](mailto:OEM@dot.state.fl.us). In the event a new or revised FHWA policy or guidance is not made available to FDOT as described in this subpart, and if FDOT had no knowledge of such policy or guidance, then a failure by FDOT to comply with such federal policy or guidance will not be a basis for termination of this MOU or a negative audit finding under this MOU.
- 5.1.4 FDOT will coordinate with federal agencies concerning applicable laws, guidance, and policies that such other federal agencies are responsible for administering with respect to FDOT's assumption of responsibilities for highway projects under this MOU.

Within six months of the Effective Date of this MOU, FDOT will work with FHWA and the agencies to modify existing interagency agreements. Such actions may include:

- A. Obtaining written consent to the continuation of the interagency agreement in its existing form, but with the substitution of FDOT for FHWA; or
- B. Amending the interagency agreement as needed so that the interagency agreement continues but that FDOT assumes FHWA's responsibilities.

If an affected agency does not agree to modify the interagency agreement, then to the extent permitted by applicable law and regulation, FDOT will carry out the assumed environmental review, consultation, or other related activity in accordance with applicable laws and regulations but without the benefit of the provisions of the interagency agreement.

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- 5.1.5 Upon termination of this MOU, FDOT and FHWA shall contact the relevant agency to determine whether the interagency agreement should be amended or reinstated as appropriate.

### **5.2 Rulemaking**

- 5.2.1 As provided under 23 U.S.C. §327(f), nothing in this MOU allows FDOT to assume any rulemaking authority of the USDOT Secretary. Additionally, FDOT may not establish policy and guidance on behalf of the USDOT Secretary or FHWA for highway projects covered in this MOU. FDOT's authority to establish state regulations, policy, and guidance concerning the state environmental review of state highway projects shall not supersede applicable federal environmental review regulations, formal policy, or guidance established by or applicable to the USDOT Secretary or FHWA.

### **5.3 Effect of Assumption**

- 5.3.1 For purposes of carrying out the responsibilities assumed under this MOU, and subject to the limitations contained in 23 U.S.C. §327 and this MOU, FDOT shall be deemed to be acting as FHWA with respect to the environmental review, consultation, and other related actions required under those responsibilities.

### **5.4 Other Federal Agencies**

- 5.4.1 As provided under 23 U.S.C. §327(a)(2)(E), nothing in this MOU preempts or interferes with any power, jurisdiction, responsibility, or authority of any federal agency other than the USDOT (including FHWA), under applicable statutes and regulations with respect to a highway project.

## **PART 6. LITIGATION**

### **6.1 Responsibility and Liability**

- 6.1.1 As provided in 23 U.S.C. 327(e), FDOT shall be solely responsible and solely liable for carrying out all of the USDOT Secretary's responsibilities it has assumed under this MOU, in lieu of and without further approval of the USDOT Secretary. The FHWA and USDOT shall have no responsibility or liability for the performance of the responsibilities assumed by FDOT, including any decision or approval made by FDOT while participating in the Program.

### **6.2 Litigation**

- 6.2.1 Nothing in this MOU affects the United States Department of Justice's (hereinafter "USDOJ") authority to litigate claims, including the authority to approve a settlement on behalf of the United States if either FHWA or another agency of the United States is named in such litigation, or if the United States intervenes pursuant to 23 U.S.C. 327(d)(3). In the event FHWA or any other Federal agency is named in litigation related to matters under this MOU, or the United States intervenes in the litigation, FDOT agrees to coordinate with FHWA and any USDOJ or Federal agency attorneys in the defense of that action.
- 6.2.2 FDOT shall defend all claims brought in connection with its discharge of any responsibility assumed under this MOU. In the event of litigation, FDOT shall provide qualified and competent legal counsel, including outside counsel if necessary. FDOT shall provide the defense at its own expense, subject to 23 U.S.C. 327(a)(2)(G) concerning Federal-aid participation in attorney's fees for outside counsel hired by FDOT. FDOT shall be responsible for opposing party's attorney's fees and court costs if a court awards those costs to an opposing party, or in the event those costs are part of a settlement agreement.
- 6.2.3 FDOT will notify the FHWA's Florida Division Office and USDOJ within seven (7) calendar days of FDOT's Office of General Counsel's receipt of service of process of any complaint, concerning its discharge of any responsibility assumed under this MOU. FDOT's notification to FHWA and USDOJ shall be made prior to its response to the complaint. In addition, FDOT shall notify the FHWA's Florida Division Office within seven (7) calendar days of receipt of any notice of intent to sue concerning its discharge of any responsibility assumed under this MOU.

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- 6.2.4 FDOT will provide the FHWA's Florida Division Office and USDOJ copies of any complaint or notice of intent to the FHWA and USDOJ within seven (7) calendar days of receipt of service.
- 6.2.5 FDOT will notify the FHWA's Florida Division Office and USDOJ prior to settling any lawsuit, in whole or in part, and shall provide the FHWA and USDOJ with a reasonable amount of time of at least ten (10) calendar days, unless a shorter time is dictated by the Court or court proceedings, which may be extended, if feasible based on the context of the lawsuit, up to a maximum of thirty (30) total calendar days, to review and comment on the proposed settlement. FDOT will not execute any settlement agreement until: (1) FHWA and USDOJ have provided comments on the proposed settlement; (2) indicated that they will not provide comments on the proposed settlement, or (3) the review period has expired, whichever occurs first.
- 6.2.6 Within seven (7) calendar days of receipt by FDOT, FDOT will provide notice to FHWA's Division Office and USDOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities FDOT has assumed under this MOU. FDOT shall notify FHWA's Division Office and USDOJ within five (5) days of filing a notice of appeal of a court decision. FDOT shall confer with FHWA and USDOJ regarding the appeal at least forty-five (45) days before filing an appeal brief in the case.
- 6.2.7 FDOT's notifications to FHWA and USDOJ in subparts 6.2.3, 6.2.4, 6.2.5, and 6.2.6 shall be made by electronic mail to [FHWA\\_assignment\\_lit@dot.gov](mailto:FHWA_assignment_lit@dot.gov) and [NRSDOT.enrd@usdoj.gov](mailto:NRSDOT.enrd@usdoj.gov), unless otherwise specified by FHWA and USDOJ. For copies of motions, pleadings, briefs, and other documents filed in a case, FDOT will either send the materials to the email address identified above, send hardcopies to the mail address below, or add to the distribution list in the court's electronic filing system (e.g., PACER) the following two email addresses: [FHWA\\_assignment\\_lit@dot.gov](mailto:FHWA_assignment_lit@dot.gov) and [efile\\_nrs.enrd@usdoj.gov](mailto:efile_nrs.enrd@usdoj.gov). FHWA and USDOJ's comments under subparts 6.2.5 and 6.2.6 shall be made by electronic mail to [NEPACounsel@dot.state.fl.us](mailto:NEPACounsel@dot.state.fl.us) unless otherwise specified by FDOT. In the event that regular mail is determined necessary, mail should be sent to:

**For USDOJ:** Assistant Attorney General for the Environment and Natural Resources Division at 950 Pennsylvania Avenue, NW, Room 2143, Washington, DC, 20530.

**For FHWA:** Division Administrator, FHWA Florida Division, 3500 Financial Plaza, Suite 400, Tallahassee, FL 32312

**For FDOT:** Special Counsel for Environmental Affairs, Office of General Counsel, 605 Suwannee Street Mail Station 58, Tallahassee, Florida 32399-0458

### **6.3 Conflict Resolution**

- 6.3.1 In discharging any of the USDOT Secretary's responsibilities under this MOU, FDOT agrees to comply with any applicable requirements of USDOT and FHWA statute, regulation, guidance or policy regarding conflict resolution. This includes the USDOT Secretary's responsibilities for issue resolution under 23 U.S.C. §139(h)(6), with the exception of the USDOT Secretary's responsibilities under 23 U.S.C. §139(h)(7) regarding financial penalties.
- 6.3.2 FDOT agrees to follow 40 CFR part 1504 in the event of pre-decision referrals to CEQ for Federal actions determined to be environmentally unsatisfactory. FDOT also agrees to coordinate and work with CEQ on matters brought to CEQ with regards to the environmental review responsibilities for Federal highway projects FDOT has assumed under this MOU.

## **PART 7. INVOLVEMENT WITH OTHER AGENCIES**

### **7.1 Coordination**

- 7.1.1 FDOT agrees to seek early and appropriate coordination with all applicable federal, state, and local agencies in carrying out any of the responsibilities for highway projects assumed under this MOU.

## **7.2 Processes and Procedures**

- 7.2.1 FDOT will ensure that it has appropriate processes and procedures in place that provide for proactive and timely consultation, coordination, and communication with appropriate federal agencies in order to carry out the responsibilities assumed under this MOU, including the submission of all EISs together with comments and responses to the Environmental Protection Agency (EPA) as required by 40 C.F.R. §1506.9 and for EPA's review as required by section 309 of the Clean Air Act, 42 U.S.C. §7609. These processes and procedures shall be formally documented. Documentation may be a formally executed interagency agreement or other format as appropriate.

## **PART 8. INVOLVEMENT WITH FHWA**

### **8.1 Generally**

- 8.1.1 In discharging any of the USDOT Secretary's and FHWA's responsibilities under this MOU, FDOT and FHWA agree to work cooperatively to resolve substantive issues regarding the implementation or interpretation of this MOU. FHWA shall provide FDOT with access to its project file upon request, excluding protected and privilege information, or with copies of said information, within a timeframe, as agreed upon, based on the complexity of the request.
- 8.1.2 Except as specifically provided otherwise in this MOU, FHWA will not provide project-level assistance to FDOT in carrying out the responsibilities it has assumed under this MOU. Project-level assistance includes advice, consultation, or document review with respect to the discharge of such responsibility for a particular highway project. However, project-level assistance does not include: process or program level assistance as provided in subpart 8.1.5 of this MOU, including discussions concerning issues addressed in prior projects, interpretations of applicable law contained in Title 23 U.S.C. or Title 49 U.S.C., interpretations of any FHWA or USDOT regulation, or interpretations of FHWA or USDOT policies or guidance. FHWA agrees that any discussions or coordination related to process or program level assistance, prior project decisions or issues, or interpretation of law, shall be directed to the Director of the Office of Environmental Management for resolution.
- 8.1.3 The FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue involving FDOT's consultation or coordination with other Federal agencies with respect to FDOT's discharge of any of the responsibilities assumed under this MOU for any particular highway project. However, the FHWA may attend meetings between FDOT and other Federal agencies and submit comments to FDOT and the other Federal agency in the following extraordinary circumstances:
- A. FHWA reasonably believes that FDOT is not in compliance with this MOU;
  - B. FHWA determines that an issue between FDOT and the other Federal agency concerns emerging national policy issues under development by the USDOT; or
  - C. Upon request by either FDOT Director of the Office of Environmental Management or the other Federal agency and agreement by FHWA.

The FHWA will notify both FDOT and the relevant Federal agency prior to attending any meetings between FDOT and such other Federal agency. The notice shall be made in writing and include an explanation of extraordinary circumstances for attendance.

- 8.1.4 Other Federal agencies may raise concerns regarding the compliance with this MOU by FDOT and may communicate these concerns to the FHWA. The FHWA will review the program- or policy-level concerns and any other information provided to FHWA by such other Federal agency. If, after such review, the FHWA and such other Federal agency still have concerns regarding FDOT's compliance, the FHWA will notify the Director of the Office of Environmental Management in a timely manner of the potential compliance issue and will work with both FDOT and the relevant Federal agency to resolve the issue and, if necessary, take appropriate action to ensure compliance with this MOU.

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- 8.1.5 At FDOT's request, FHWA may assist FDOT in evaluating its environmental program and developing or modifying any of its processes or procedures to carry out the responsibilities it has assumed under this MOU, including, but not limited to, emerging national policy issues, and those processes and procedures concerning FDOT's consultation, coordination, and communication with other federal agencies.
- 8.1.6 FDOT's obligations and responsibilities under 23 C.F.R. §1.5 are not altered in any way by executing this MOU.

### **8.2 MOU Monitoring and Oversight**

- 8.2.1 FHWA will provide necessary and appropriate monitoring and oversight of FDOT's compliance with this MOU. FHWA's monitoring and oversight activities in years 1 through 4 of this MOU's term will primarily consist of an annual audit as provided at 23 U.S.C. §327(g) and Part 11 of this MOU, and evaluating attainment of the performance measures listed in Part 10 of this MOU. After the fourth year of FDOT's participation in the Program, FHWA will monitor FDOT's compliance with the Program. The FHWA's monitoring and oversight may also include submitting requests for information to FDOT and other relevant Federal agencies, verifying FDOT's financial and personnel resources dedicated to carrying out the responsibilities assumed, and reviewing documents and other information.
- 8.2.2 Pursuant to 23 U.S.C. §327(c)(4), FDOT is responsible for providing FHWA any information FHWA reasonably considers necessary to ensure that FDOT is adequately carrying out the responsibilities assigned. When requesting information subject to section 327(c)(4), FHWA will provide the request to FDOT in writing, and the request will identify with reasonable specificity the information required. FHWA will also indicate in the request a deadline for the information to be provided. FDOT will, in good faith, work to ensure the information requested is provided by the deadline. FDOT's response to an information request under this paragraph will include, where appropriate, making relevant employees and consultants available at their work location (including in-person meeting, teleconference, videoconference or other electronic means as may be available).
- 8.2.3 FDOT shall make project files and general administrative files pertaining to the discharge of the responsibilities it has assumed under this MOU reasonably available for inspection by FHWA at the files' locations upon reasonable notice, which is not less than 5 business days. These files shall include, but are not limited to, letters and comments received from governmental agencies, the public, and others with respect to FDOT's discharge of the responsibilities assumed under this MOU.
- 8.2.4 In carrying out the responsibilities assumed under this MOU, FDOT agrees to carry out regular quality control and quality assurance (QA/QC) reviews to ensure that the assumed responsibilities are being conducted in accordance with applicable law and this MOU. At a minimum, FDOT's QA/QC process will include the review and monitoring of its processes and performance relating to project decisions, completion of environmental analysis, project file documentation, checking for errors and omissions, and legal sufficiency reviews, and taking appropriate corrective action as needed. Within 6 months of the effective date of this MOU, FDOT shall finalize a QA/QC process that satisfies the requirements in this subpart. FDOT agrees to consider recommendations FHWA may have made with respect to its QA/QC process.
- 8.2.5 FDOT shall perform annual self-assessments of its QA/QC process and performance to determine if its process is working as intended. If any process areas are identified as needing improvement, FDOT will take appropriate and timely corrective actions to address such areas. At least 1 month prior to the date of a scheduled on-site FHWA audit FDOT will transmit a summary of its self-assessment to the FHWA Florida Division Office. The summary will include a description of the scope of the self-assessment conducted and the areas reviewed, a description of the process followed in conducting the self-assessment, a list of the areas identified as needing improvement, any corrective actions that have been or will be implemented and a statement from the Director of FDOT's Office of Environmental Management concerning whether the processes are ensuring that the responsibilities FDOT has assumed under this MOU are being carried-out in accordance with this MOU and all

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applicable Federal laws and policies, and a summary of FDOT's progress toward attaining the performance measures listed in Part 10 of this MOU.

- 8.2.6 Upon the Effective Date of this MOU, FDOT will maintain a list of NEPA approvals and decisions (Type 1 CE, Type 2 CEs, EA, FONSI, DEIS, FEIS, FEIS/ROD, ROD) and Section 4(f) Determinations it makes under this MOU. FDOT will provide this list to FHWA on a quarterly basis for a period of 2 years. Thereafter, FDOT will provide this list to FHWA every 6 months.

### **8.3 Records Retention**

- 8.3.1 FDOT will retain project files and files pertaining to the discharge of its responsibilities under this MOU in accordance with FDOT Records Management Policy (Topic Number 050-020-025) and Retention and Disposal Schedule GS1-SL(167), which meets or exceeds requirements established in the FHWA Records Disposition Manual (Field Offices) Chapter 4, FHWA Order No. 1324.1 B, issued July 29, 2013.
- 8.3.2 In accordance with FDOT Records Management Policy (Topic Number 050-020-025) and Retention and Disposal Schedule GS1-SL(167), records will be retained for 5 fiscal years after the completion of the project, reporting requirement or other applicable activity.

To the extent that FHWA's Records Disposition Manual is amended to provide for a longer retention period, FDOT will meet such requirement.

FDOT will permanently store records for Significant Transportation Projects as they are defined in FHWA Order No. 1324.1B.

- 8.3.3 In the case of a conflict between FHWA Records Disposition Manual, FHWA Order M1324.1B, FDOT Records Management Policy, and Retention and Disposal Schedule the more stringent retention requirements shall control.
- 8.3.4 Nothing contained in this MOU is intended to relieve FDOT of its recordkeeping responsibilities under 2 C.F.R. §§200.333-200.337 (Record Retention and Access) or other applicable laws.

### **8.4 Federal Register**

- 8.4.1 For any documents that are required to be published in the *Federal Register*, such as the Notice of Intent under 23 C.F.R. §771.123(a) and Notice of Final Agency Action under 23 U.S.C. §139(l)(2), FDOT shall transmit such document to FHWA's Florida Division Office, with a request for publication in the *Federal Register* on behalf of FDOT. FHWA's Florida Division Office will submit such document to the *Federal Register* within 5 calendar days of receipt of FDOT's request for publication in the *Federal Register*. If requested, FDOT shall reimburse FHWA for the expenses associated with publishing such documents in the *Federal Register* (excluding FHWA's overhead). To the extent that the operating procedures of the *Federal Register* allow, FDOT will be responsible for publication in the *Federal Register*.

### **8.5 Participation in Resource Agency Reports**

- 8.5.1 FDOT agrees to provide data and information requested by the FHWA and resource agencies for the preparation of national reports to the extent that the information relates to determinations, findings, and proceedings associated with projects processed under this MOU. Such reports include but are not limited to:
- A. Information on the time to complete all NEPA classes of action (EIS, EA, CE);
  - B. Archeology Reports requested by the National Park Service (NPS);

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- C. Endangered Species Act Expenditure Reports requested by the USFWS and NMFS;
- D. Project status and information for EAs and EISs for use on the searchable website maintained under section 41003(b) of the FAST Act [Fixing America's Surface Transportation Act, 42 U.S.C. §4370m-2(b); 23 U.S.C. §139(o)] (Federal Permitting Dashboard)
- E. NEPA Litigation Reports requested by CEQ; and
- F. Environmental Conflict Resolution reports requested by the Office of Management and Budget and CEQ.

### **8.6 Conformity Determinations**

- 8.6.1 Pursuant to 23 U.S.C. §327(a)(2)(B)(iv)(II), for any project requiring a project-level conformity determination under the Clean Air Act and its implementing regulations, the FHWA's Florida Division Office will document the project level conformity determination within the timeframe identified in FDOT's project schedule. FHWA's Florida Division Office will restrict its review to only that data, analyses, applicable comments and responses, and other relevant documentation that enable FHWA to make the project-level conformity determination.

### **8.7 Certification of NEPA Compliance**

- 8.7.1 For projects funded by FHWA, FDOT shall ensure that a certification is included with each request for funding specifying that FDOT has fully carried out all responsibilities assumed under this MOU in accordance with this MOU and all applicable Federal laws, regulations, executive orders, and policies. FDOT shall ensure that this certification is made prior to the execution of any future Federal-aid approval or action. FDOT agrees to provide FHWA access to NEPA approvals and certifications.

### **8.8 Enforcement**

- 8.8.1 Should FHWA determine that FDOT is not in compliance with this MOU, then FHWA shall take appropriate action, including appropriate remedies provided at 23 C.F.R. §1.36 for violations of or failure to comply with Federal law or regulations at 23 CFR with respect to a project, withdrawing assignment of any responsibilities that have been assumed as provided in Part 9 of this MOU, or terminating FDOT's participation in the Program as provided in Part 13 of this MOU.

## **PART 9. WITHDRAWAL OF ASSIGNED RESPONSIBILITIES**

### **9.1 FHWA-Initiated Withdrawal of Assigned Projects**

- 9.1.1 Subject to the process in subpart 9.1.2 FHWA may, at any time, withdraw the assignment of all or part of the USDOT Secretary's responsibilities that have been assumed by FDOT under this MOU for any highway project or highway projects upon FHWA's determination that:
  - A. With respect to such project, FDOT is not in compliance with a material term of this MOU or applicable federal laws or policies, and FDOT has not taken sufficient corrective action to the satisfaction of the FHWA;
  - B. The highway project or highway projects involve significant or unique national policy interests for which FDOT's assumption of the USDOT Secretary's responsibilities would be inappropriate; or
  - C. FDOT cannot satisfactorily resolve an issue or concern raised in government-to-government consultation process, as provided in subpart 3.2.3.

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- 9.1.2 Upon the FHWA's determination to withdraw assignment of the USDOT Secretary's responsibilities under subpart 9.1.1, FHWA will notify FDOT of FHWA's determination including the reasons for its determination. Upon receipt of this notice, FDOT may submit any comments that resolve the reasons for the determination or objections to the FHWA within 30 calendar days, unless an extended period of time is agreed to by the FHWA. Upon receipt of FDOT's comments or objections, FHWA will make a final determination within 30 calendar days, unless extended by FHWA for cause, and notify FDOT of its decision. In making its determination, FHWA will consider FDOT's comments or objections, the effect the withdrawal of assignment will have on the Program, the amount of disruption to the project concerned, the effect on other projects, confusion the withdrawal of assignment may cause to the public, the potential burden to other Federal agencies, and the overall public interest.
- 9.1.3 The FHWA shall withdraw assignment of the responsibilities FDOT has assumed for any highway project when the preferred alternative that is identified in the CEs, EA, or FEIS is a highway project that is specifically excluded in subpart 3.3.2. In such case, subpart 9.1.2 of this MOU shall not apply.

### **9.2 FDOT-Initiated Withdrawal of Assignment of Projects**

- 9.2.1 FDOT may, at any time, provide the FHWA with notice of its intent to withdraw a highway project assumed under this MOU.
- 9.2.2 Upon FDOT's decision to request FHWA withdraw the assignment of the USDOT Secretary's responsibilities under subpart 9.2.1, FDOT shall informally notify FHWA of its desire for FHWA to withdraw assignment of its responsibilities. After informally notifying FHWA of its desire, FDOT will provide FHWA written notice of its desire, including the reasons for wanting FHWA to withdraw assignment of the responsibilities for a highway project. Upon receipt of this notice, the FHWA will have 30 calendar days, unless extended by FDOT for cause, to determine whether it will withdraw assignment of the responsibilities requested. In making its determination, FHWA will consider the reasons FDOT desires FHWA to withdraw assignment of the responsibilities, the effect the withdrawal of assignment will have on the Program, amount of disruption to the project concerned, the effect on other projects, confusion the withdrawal of assignment may cause to the public, the potential burden to other Federal agencies, and the overall public interest.

## **PART 10. PERFORMANCE MEASURES**

### **10.1 General**

- 10.1.1 Both FHWA and FDOT have determined it is desirable to mutually establish a set of performance measures to evaluate FDOT's administration of the responsibilities assumed under this MOU.
- 10.1.2 FDOT's attainment of the performance measures established in this Part of the MOU will be considered during the FHWA audits, which are required by 23 U.S.C. §327(g).
- 10.1.3 FDOT shall collect and maintain necessary and appropriate data related to the performance measures. In collecting this data, FDOT shall monitor its progress toward meeting the performance measures and include its progress in the self-assessment summary described in subpart 8.2.5 of this MOU. The summary shall be made available to the FHWA as provided in subpart 8.2.5.

### **10.2 Performance Measures**

- 10.2.1 The performance measures applicable to FDOT in carrying out the responsibilities it has assumed under this MOU are as follows:
- A. Compliance with NEPA, FHWA NEPA regulations, and other federal environmental statutes and regulations:
- i. Maintain documentation regarding compliance with responsibilities assumed under this MOU



**B. QA/QC for NEPA decisions:**

- i. Maintain internal QA/QC measures and processes, including a record of:
  - a. Completion of legal sufficiency reviews by FDOT's Office of General Counsel (OGC)
  - b. Compliance with FDOT's environmental document content standards and procedures, including those related to QA/QC

**C. Relationships with agencies and the general public:**

- i. Maintain communication considering timeliness and responsiveness among FDOT, federal and state resource agencies, Indian Tribes, and the public.
- ii. Provide opportunities for public involvement and comment
- iii. Use NEPA issue resolution process, as appropriate.

**D. Increased efficiency and timeliness in completion of the NEPA process:**

- i. Compare time of completion of environmental document (e.g., NEPA documents and technical reports) approvals before and after assumption of responsibilities

**PART 11. AUDITS**

**11.1 General**

- 11.1.1 As required by 23 U.S.C. §327(g), the FHWA will conduct four annual audits of FDOT's discharge of the responsibilities it has assumed under this MOU (an annual audit during each of the first four years after the Effective Date). During the first four years, audits will be the primary mechanism used by FHWA to oversee FDOT's compliance with this MOU, ensure compliance with applicable federal laws and policies, evaluate FDOT's progress toward achieving the performance measures identified in Part 10, and collect information needed for the USDOT Secretary's annual report to Congress.

Pursuant to 23 U.S.C. 327(g)(1)(A), FHWA and FDOT will meet, not later than 180 days after the date of execution of this MOU, to review implementation of the MOU and discuss plans for the first annual audit.

Pursuant to 23 U.S.C. 327(g)(3), each audit carried out under this MOU shall be carried out by an audit team, consisting of members designated by FHWA in consultation with the State. Such consultation shall include a reasonable opportunity for FDOT to review and provide comments on the proposed members of the audit team.

- 11.1.2 Pursuant to 23 U.S.C. §327(c)(4), FDOT is responsible for providing FHWA any information the FHWA reasonably considers necessary to ensure that FDOT is adequately carrying out the responsibilities assigned. In accordance with Part 8.2.2, FDOT will make documents and records available for review by FHWA in conducting audits and shall provide FHWA with access to, or copies of, any such documents and records as may be requested by FHWA.

- 11.1.3 FDOT agrees to cooperate with FHWA in conducting audits, including providing access to all necessary information, making all employees available to answer questions (including consultants hired for the purpose of carrying out the USDOT Secretary's responsibilities), and providing all requested information (including making employees available) to FHWA in a timely manner. Employees will be made available either in-person at their normal place of business or by telephone, at the discretion of FHWA.

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- 11.1.4 FDOT and FHWA Florida Division Office will each designate an audit coordinator who will be responsible for coordinating audit schedules, requests for information, and arranging audit meetings. The FDOT audit coordinator will be responsible for arranging access to necessary information and making employees available to answer questions.
- 11.1.5 The FHWA audits will include, but not be limited to, consideration of FDOT's staffing, technical competency and organizational capacity, adequacy of the financial resources committed by FDOT to administer the responsibilities assumed, quality control and quality assurance process, attainment of performance measures, compliance with this MOU's requirements, and compliance with applicable Federal laws and policies in administering the responsibilities assumed.

### **11.2 Scheduling**

- 11.2.1 As provided at 23 U.S.C. 327(g), FHWA will conduct an annual audit during each of the first four years after the Effective Date. After the fourth year of FDOT's participation in the Program, FHWA will monitor FDOT's compliance with the MOU, including the provision by FDOT of financial resources to carry-out the MOU, but will not conduct additional audits under this Part. In the event the frequency of the audits is modified by amendments to 23 U.S.C. §327(g), the frequency established by the statutory amendments will control and apply to this subpart.
- 11.2.2 For each annual audit, the designated audit coordinators for FHWA and FDOT will work to establish a general audit schedule within 180 days of the Effective Date or anniversary date of this MOU. The general audit schedule will include the dates that FHWA will conduct the audit. To the maximum extent practicable, the general audit schedule will identify all employees (including consultants) and documents and other records that FDOT will make available, as requested by FHWA in support of the audit. With respect to documents and other records, FHWA agrees to be as specific as possible, although a general description of the types of documents will be acceptable. The general schedule will include the time period for completing an annual audit from initiation to completion (including public comment and responses to those comments) which shall not exceed 180 calendar days, pursuant to 23 U.S.C. 327 (g)(1)(C).
- 11.2.3 FDOT's audit coordinator shall make reasonable efforts to ensure all identified employees (including consultants) are available to FHWA during the specified dates on the general audit schedule. FDOT will also ensure necessary documents and records are made reasonably available to FHWA as needed during the general audit schedule.
- 11.2.4 After the general audit schedule is established, the audit coordinators shall work to establish specific audit schedules at least two weeks prior to the scheduled audit. The specific audit schedule shall include the dates, times, and place for which FHWA will talk to FDOT's employees (including consultants) and review documents and records.
- 11.2.5 To the maximum extent practicable, the specific audit schedule will identify all employees (including consultants) and documents and other records that FDOT will make available to FHWA during the audit. Should FHWA determine that it needs access to an employee, document or other record that is not identified in the specific audit schedule, FDOT will make reasonable efforts to produce such employee, document or other record on the specified dates.

### **11.3 Other Federal Agency Involvement**

- 11.3.1 The FHWA may invite other Federal or State agencies as deemed appropriate, include State Historic Preservation Officers (SHPO), to assist FHWA in conducting an audit under this MOU by sitting in on interviews, reviewing documents obtained by FHWA, and making recommendations to FHWA. FHWA's audit coordinator will advise FDOT's audit coordinator of its intent to include other federal or state agencies and the proposed role of such agencies in the audit team. If FHWA invites another federal or state agency to participate in the audit team, the agency will be placed on the general and specific audit schedules and the provisions of 23 U.S.C. §327(g)(3)(B) shall apply.

#### **11.4 Audit Report and Findings**

- 11.4.1 Upon completing each audit, FHWA will transmit to FDOT a draft of the audit report and allow FDOT a period of 14 calendar days within which to submit written comments to FHWA. The FHWA will grant any reasonable request by FDOT to extend its deadline to respond in writing to a draft audit report not to exceed a total review period of 30 days. FHWA will review the comments provided by FDOT and revise the draft audit report as may be appropriate. FDOT and FHWA may also meet and discuss the draft report and FDOT's comments. If FDOT anticipates an additional meeting will be beneficial, FDOT will notify the FHWA audit coordinator prior to providing its written comments so that such meeting may be timely scheduled. FHWA will then prepare the draft audit report for public comment.
- 11.4.2 As required by 23 U.S.C. §327(g)(2), FHWA will make the draft audit report available for public comment. In carrying out this requirement, FHWA will, after receipt and incorporation of FDOT comments as provided in subpart 11.4.1, publish the audit report in the *Federal Register* and allow a comment period of 30 calendar days. FHWA will then address and respond to the public comments by incorporating the comments and response into the final audit report. The final audit report will be published in the *Federal Register* not later than 60 calendar days after the comment period closes.

### **PART 12. TRAINING**

- 12.1 FDOT may request and subject to FHWA's resource availability, FHWA will provide training with respect to the responsibilities being assigned to FDOT under this MOU. Such training may be provided to FDOT by either FHWA, another federal agency or other parties, as may be appropriate. FDOT may also conduct its own training for staff and consultants.
- 12.2 FDOT will continue to implement training necessary to meet its environmental obligations. Within 6 months of the Effective Date of the MOU, FDOT will update its training program to reflect the responsibilities assumed under the Program and this MOU. FDOT will be solely responsible for the development and implementation of its training program.

### **PART 13. TERM, TERMINATION AND RENEWAL**

#### **13.1 Term**

- 13.1.1 This MOU has a term of 5 years from the Effective Date.

#### **13.2 Termination by the FHWA**

- 13.2.1 As provided by 23 U.S.C. §327(j)(1), the FHWA may terminate FDOT's participation in the Program, in whole or in part, at any time subject to the procedural requirements in 23 U.S.C. §327 and subpart 13.2.2 of this MOU. Termination may be based on FDOT's failure to adequately carry out its responsibilities including, but not limited to:
- A. Persistent neglect of, or noncompliance with, federal laws, regulations, and policies;
  - B. Failure to address deficiencies identified during the audit or monitoring process;
  - C. Failure to secure or maintain adequate personnel and/or financial resources to carry out the responsibilities assumed;
  - D. Intentional non-compliance with this MOU; or
  - E. Persistent failure to adequately consult, coordinate, and/or take into account the concerns of other Operating Administrations, when applicable and appropriate federal, state, tribal, and local agencies with oversight, consulting, or coordination responsibilities under Federal environmental laws and regulations.

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- 13.2.2 If the FHWA determines that FDOT is not adequately carrying out the responsibilities assigned, then prior to termination, the FHWA shall:
- A. Provide FDOT written notification of its non-compliance determination detailing a description of each responsibility in need of corrective action regarding an inadequacy identified;
  - B. Provide FDOT a period of not less than 120 days to take such corrective action as the FHWA determines is necessary to comply with this MOU; and
- 13.2.3 If FDOT, after notification and the 120 day period, fails to take satisfactory corrective action, as determined by FHWA, FHWA shall provide notice to FDOT of its determination of termination. Any responsibilities identified to be terminated in the notice that have been assumed by FDOT under this MOU shall transfer to FHWA.

### **13.3 Termination by Florida**

- 13.3.1 The Florida Legislature and Governor may, at any time, terminate FDOT's authority granted to participate in this Program. In such event, FDOT will work with FHWA to jointly develop a plan to transition the responsibilities that FDOT has assumed back to FHWA so as to minimize disruption to projects, minimize confusion to the public, and minimize burdens to other affected federal, state, and local agencies.
- 13.3.2 FDOT may terminate its participation in the Program, in whole or in part, at any time by providing the FHWA notice of its intent at least ninety (90) calendar days prior to the date that FDOT seeks to terminate. In that event, FHWA and FDOT shall develop a plan to transition the responsibilities that FDOT has assumed back to FHWA so as to minimize disruption to projects, minimize confusion to the public, and minimize burdens to other affected federal, state, and local agencies.
- 13.3.3 Any termination of assignment agreed to under a transition plan shall not be subject to the procedures or limitations provided for in Part 9 of this MOU and shall be valid as agreed to in the transition plan.

### **13.4 Validity of FDOT Actions**

- 13.4.1 Any environmental approvals made by FDOT pursuant to the responsibilities FDOT has assumed under this MOU shall remain valid after termination of FDOT's participation in the Program or withdrawal of assignment by FHWA. As among the USDOT Secretary, FHWA and FDOT, FDOT shall remain solely liable and solely responsible for any environmental approvals it makes pursuant to any of the responsibilities it has assumed while participating in the Program.

### **13.5 Renewal**

- 13.5.1 This MOU is renewable in accordance with 23 U.S.C. §327(c)(6) and 23 C.F.R. 773.115.
- A. FDOT shall notify FHWA at least 12 months before the expiration of this MOU of its intent to renew its participation in the Program.
  - B. Prior to requesting renewal, FDOT shall coordinate with FHWA to determine if significant changes have occurred or if new assignment responsibilities are being sought that would warrant a statewide notice and opportunity for public comment prior to FDOT's submittal of the renewal package.
  - C. FDOT's renewal package shall meet the requirements in 23 CFR 771.115(c); and
  - D. FDOT shall submit the renewal package no later than 180 days prior to the expiration date of the MOU.

**PART 14. AMENDMENTS**

**14.1 Generally**

- 14.1.1 This MOU may be amended at any time upon mutual agreement by both the FHWA and FDOT pursuant to 23 C.F.R. §773.113.

**14.2 Additional Projects, Classes of Projects and Environmental Review Responsibilities**

- 14.2.1 The FHWA may assign, and FDOT may assume, responsibility for additional projects, and additional environmental review responsibilities beyond those identified in Part 3 of this MOU, by executing an amendment to this MOU.
- 14.2.2 If FDOT decides to request amendment of this MOU to add or remove responsibility for projects or classes of projects, or environmental review responsibilities beyond those identified in Part 3 of this MOU, such request shall be treated as an amendment to FDOT's original application that was submitted to FHWA pursuant to 23 U.S.C. §327(b) and 23 C.F.R. part 773. In developing the application supplement, FDOT shall identify the projects, classes of projects, and environmental review responsibilities it wishes to assume and make any appropriate adjustments to the information contained in FDOT's original application, including verification of personnel and financial resources.

**FINAL Negotiated MOU Language Submitted for Publication in the FAR 9/9/16**

IN WITNESS THEREOF, the parties hereto have caused this MOU to be duly executed in duplicate as of the date of the last signature written below.

**FEDERAL HIGHWAY ADMINISTRATION**

By: \_\_\_\_\_

Dated: \_\_\_\_\_

Gregory G. Nadeau  
Administrator  
Federal Highway Administration

**STATE OF FLORIDA**

By: \_\_\_\_\_

Dated: \_\_\_\_\_

Jim Boxold  
Secretary  
Florida Department of Transportation